IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 857 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MOMIN JIVABHAI SULEMAN HUR - Petitioner(s)
Versus
MOMIN ABDUL RAHIMALIJI - Respondent(s)

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Appearance :
MR MAHENDRA K PATEL for Petitioner(s) : 1,
MR ARIF A SHEKH for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 29/08/2006

ORAL JUDGMENT

1. By instant Petition filed under Article 227 of the Constitution of India, the Petitioner challenges the order dated 28.11.2005 passed

below application exh.17 in Regular Civil Suit No. 23 of 2005 by the learned Principal Civil Judge, Vadnagar, District Mahesana, by which the application filed by the Petitioner under Order 8 Rule 1 of the Code of Civil Procedure ("the Code" for short), for permitting him to file the Written Statement has been rejected.

2. The Respondent / Plaintiff has filed Regular Civil Suit No. 23 of 2005 before the learned Principal Civil Judge, Vadnagar, District Mahesana for declaration and permanent injunction. Along with the Suit application exh.5 for temporary injunction has also been moved. The dispute is with regard to the possession of the land bearing Survey No. 427 admeasuring 1 Acre 23 Gunthas situated in the sim of village – Maulipur, Taluka Vadnagar, District Mahesana.

3. The learned Judge issued notice upon the present Petitioner. On receipt of the notice, the petitioner was under the process of collecting necessary and relevant documents to file appropriate reply to the Suit as well as application exh.5. However, in this process, some time has elapsed. The learned trial Judge, therefore, closed the right of the Petitioner to file Written Statement against the Suit as well as application exh.5, vide order dated 25.10.2005. The Petitioner, therefore, filed an application exh.17, praying to quash and set aside the order dated 25.10.2005 and permit him

to file Written Statement against the Suit as well as application exh.5. The learned trial Judge vide order dated 28.11.2005 rejected the application exh.17 and refused to permit the petitioner to file Written Statement, giving rise to the present Petition.

4. This Court has considered the submissions advanced by Mr. Mahendra K. Patel, learned advocate of the Petitioner and Mr. Arif A. Shekh, learned advocate for the Respondent, perused the impugned order as well as the statutory provisions contained under the Code.

5. As per the statutory provisions contained under Order 8 Rule 1, the Defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence. However, as per the proviso contained under Order 8 Rule 1 of the Code, if the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

6. In the instant case the Suit was filed on 31.8.2005 and the summons were served on the petitioner on 1.9.2005 and the learned trial Judge closed the stage of filing the Written Statement of the Petitioner on 25.10.2005, i.e. within a period of 1 month and 25 days only. As

per the statutory provisions contained under the Code, the Defendant shall be allowed to file Written Statement after 30 days but it shall not be later than 90 days from the date of service of the summons. Meaning thereby that the learned trial Judge has discretion to permit the petitioner to file Written Statement within 90 days from 1.9.2005. The period of 90 days expired on 1.12.2005. Therefore, according to this Court, the learned trial Judge has committed material error in rejecting the application exh. 17 filed by the petitioner, for permitting him to file the Written Statement.

7. In the case of Kailash v/s. Nanhku and Others, (2005) 4 SCC 480, the Supreme Court has held that Order 8 Rule 1 and proviso thereto as amended by the Act 22 of 2002 (w.e.f. 1.7.2002) are directory in character and not mandatory. It was further held that the discretion of the Court to take Written Statement on record though filed beyond time prescribed therein should not be granted as a matter of routine and merely for the asking, and especially when period of 90 days has expired. However, even after 90 days, power can be exercised to permit to file Written Statement. In the said judgement guidelines for exercise of the discretion by the Court in this regard elucidated in detail.

8. Therefore, in view of the ratio laid down by the Supreme Court in the case of Kailash (supra), Written Statement can be permitted to be filed

even after the period of 90 days as per the provisions contained under Order 8 Rule 1 of the Code whereas in the instant case even 90 days have not been elapsed, therefore also the impugned order deserves to be quashed and set aside by permitting the petitioner to file Written Statement.

9. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The impugned order dated 28.11.2005 recorded below application exh. 17 in Regular Civil Suit No. 23 of 2005 by the learned Principal Civil Judge, Vadnagar is hereby quashed and set aside, result of which is that the application exh. 17 is granted. Petitioner shall file his Written Statement within a period of four weeks hereof. Rule is made absolute. No order as to costs.

(A.M.Kapadia,J)

Jayanti*